[ARGUED SEPTEMBER 29, 1995; DECIDED JULY 30, 1996]

No. 94-5295

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FIRST NATIONAL BANK AND TRUST COMPANY,
LEXINGTON STATE BANK, RANDOLPH BANK AND TRUST COMPANY,
BANKERS TRUST OF NORTH CAROLINA, AND
AMERICAN BANKERS ASSOCIATION,

Plaintiffs-Appellants,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Defendant-Appellee,

and

AT&T FAMILY FEDERAL CREDIT UNION
AND CREDIT UNION NATIONAL ASSOCIATION,

Defendants-Intervenors-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

---

**PETITION FOR REHEARING WITH SUGGESTION
FOR REHEARING EN BANC**

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FRANK W. HUNGER
Assistant Attorney General

ERIC H. HOLDER, JR.
United States Attorney

OF COUNSEL:

ROBERT M. FENNER
General Counsel

JOHN K. IANNO
Attorney
National Credit Union
Administration
1775 Duke Street
Arlington, VA 22314

DOUGLAS N. LETTER
(202) 514-3602
JACOB M. LEWIS
(202) 514-5090
Attorneys, Appellate Staff
Civil Division, Room 3617
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

This case presents issues of extraordinary importance to the National Credit Union Administration ("NCUA") and to the nation's federally-chartered credit unions. The ruling by a panel of this Court threatens to have a grave impact on nearly 2,000 credit unions serving over 24 million people.

In brief, the panel determined that a provision of the Federal Credit Union Act ("FCUA") requires that the members of any single federal credit union share a common bond. The panel's de-

cision overturns the interpretation of the National Credit Union Administration ("NCUA"), which, since at least 1982, has construed the provision to permit membership in a federal credit union to consist of multiple groups, so long as each group has its own common bond.

By effectively limiting membership in a federal credit union to a single group, the panel's decision will have a substantial adverse effect on the nation's federal credit unions. These institutions have for nearly 15 years relied on the NCUA's interpretation to permit them to serve multiple employee groups. In 1992, the latest year for which figures appear in the record, at least 1,571 of the nation's 7,800 federal credit unions, serving 17,735,000 people, had fields of membership with multiple groups. Cross-Motion of AT&T Family Federal Credit Union and Credit Union Nat'l Ass'n, Inc. for Summary Judgment, Docket Entry 54, Exhs. 1, 2. The importance of multiple employee groups has increased since then: as of December 31, 1995, the agency's records show, at least 1,963 of the nation's 7,329 federal credit unions had multiple groups, and those credit unions with such groups served more than 24 million people. Indeed, of the nation's 200 largest federal credit unions, fully 158 have multiple employee groups, and such groups comprise 38% of their membership.

If, in the wake of the panel's decision, federal credit unions are required to divest themselves of all members added

under the NCUA's multiple employee group policy, the impact potentially would be catastrophic; millions of people would be forced to withdraw their accounts and search elsewhere for affordable credit, and existing federal credit unions would have to liquidate significant portions of their portfolios in order to fund deposit outflows, as well as forego the substantial income derived from loans to members who have (and would have) joined under the NCUA's policy.

Even if the decision only results in the disallowance of future employee group additions, however, it will as a practical matter largely preclude federal credit unions from continuing to serve an enormous segment of the public -- employees of small businesses. This is because, as the agency's regulations recognize, a credit union is not likely to prove financially viable unless its potential field of membership is at least 500 persons. See Interpretive Ruling and Policy Statement ("IRPS") 94-1, 59 Fed. Reg. 29075, 29079 (1994); see also 90 F.3d at 527. The panel's decision thus will deprive small business employees of access to the low cost-credit and other financial services that have traditionally been available through credit unions, and not through banks and other financial institutions.

The extremely serious financial disruption that will be engendered by the panel's decision is entirely unnecessary. The panel erred in concluding that Congress's intent to restrict membership in a federal credit union to persons sharing a single

common bond is clearly discernible from the text and purpose of the FCUA. As we explain below, the statute is at worst ambiguous; under well-settled principles of administrative law, the panel should have deferred to the agency's permissible interpretation. On this issue, which is also before the Sixth Circuit in First City Bank v. NCUA, No. 95-6543 (6th Cir.) (scheduled for argument Oct. 15, 1996), the case should be reheard, or reheard en banc.

The plaintiff banks also lacked standing to challenge the agency's policy in the first place. This Court has acknowledged that the FCUA does not regulate banks and was not enacted to protect them from federal credit union competition. First Nat'l Bank & Trust Co. v. NCUA, 988 F.2d 1272, 1275-76 (D.C. Cir.), cert. denied, 510 U.S. 907 (1993). Banks thus fall outside the "zone of interests" to be regulated or protected by the statute. See Air Courier Conf. of Am. v. American Postal Workers Union, 498 U.S. 517, 524 (1991). This Court nonetheless concluded that banks had standing because they were "suitable challengers" to the agency's policy. First Nat'l Bank, 988 F.2d at 1276-79. The Court's conclusion, which ignores the undisputed congressional intent, conflicts with the Fourth Circuit's decision in Branch Bank & Trust Co. v. NCUA Bd., 786 F.2d 621, 626 (4th Cir. 1986), cert. denied, 479 U.S. 1063 (1987). It should therefore also be reheard en banc.

## BACKGROUND

1. This is a suit by several North Carolina banks, joined by the American Bankers Association, to various approvals issued by the NCUA in 1989 and 1990 allowing North Carolina-based AT&T Family Federal Credit Union ("ATTF") to add a number of additional employee groups to its field of membership. The banks and their national trade association contend that the approvals violate the FCUA's "common bond" provision, which states that "Federal credit union membership shall be limited to groups having a common bond of occupation or association * * *." 12 U.S.C. 1759.

The district court (Harris, J.) initially dismissed plaintiffs' claims that the NCUA approvals violated the FCUA's common bond provision on standing grounds, holding that the banks and their trade association were not arguably within the zone of interests protected by the FCUA. First Nat'l Bank & Trust v. NCUA, 772 F. Supp. 609, 611-13 (D.D.C. 1991). A panel of this Court (Wald, Silberman, D.H. Ginsburg, JJ.) reversed and remanded the case for proceedings on the merits. First Nat'l Bank & Trust Co. v. NCUA, 988 F.2d 1272 (D.C. Cir. 1993). The panel held that while the banks were not the "intended beneficiaries" of the FCUA, they were nonetheless "suitable challengers" to bring claims under the statute's common bond provision. 988 F.2d at 1275. In doing so, the panel expressly refused to follow the Fourth Circuit's Branch Bank decision, which had held that banks

do not have standing to challenge NCUA field of membership policies under the FCUA. See 988 F.2d at 1277 n.3.[1]

On remand, the district court (Pratt, J) upheld the NCUA's construction "as a reasonable interpretation of an ambiguous statute." 863 F. Supp. 9, 14 (D.D.C. 1994). A panel of this Court (Buckley, Ginsburg, Tatel, JJ.) has now reversed, concluding that Congress's intent to limit federal credit union membership to groups bound by a single common bond is "clearly discernible from the statutory text and the purpose of the statute." 90 F.3d at 527.

The panel first acknowledged that its review of the NCUA's interpretation of the FCUA was governed by the "familiar rubric" of the Supreme Court's decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984), under which, "if * * * the statute is silent or ambiguous on the question at issue, * * * the court will defer to the agency's interpretation if it is permissible in light of the structure and purpose of the statute." Ibid.

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[1]ATTF and its trade association filed a petition for certiorari, which was denied. AT&T Family Fed. Credit Union v. First Nat'l Bank & Trust Co., 510 U.S. 907 (1993). In a brief in opposition to the petition for certiorari, the government stated that it agreed "that the respondent banks are not within the zone of interests protected by the common bond provision of the Federal Credit Union Act," but that "further review is not warranted at this time because the case is in an interlocutory posture" and because "[p]ermitting the case to proceed on the merits could conserve judicial resources." Brief for the Fed. Respondent in Opp. in AT&T Family Fed. Credit Union v. First Nat'l Bank & Trust Co., No. 92-2010, at 5-6.

The panel next rejected as "unconvincing" plaintiffs' contention that the statute's requirement that credit union membership groups have "a common bond" provided conclusive evidence of Congress's intent to limit the membership of a single credit union to one common bond. 90 F.3d at 528. As it noted, "[t]he article 'a' could just as easily mean one bond for each group as one bond for all groups in an FCU." Ibid.

The panel nonetheless found that the statute's use of the word "groups," even though in plural form, supported the conclusion that Congress intended that all members of a federal credit union share a single common bond. Relying on a dictionary definition of the word "group" as an "assemblage . . . having some resemblance or common characteristic," id. at 528 (quoting Webster's New Int'l Dictionary 955 (1927)), the panel found that "a common bond is implicit in the term 'group.'" Ibid. The panel therefore concluded that "the term 'common bond' would be surplusage if it applied only to the members of each constituent group and not across all groups of members in an FCU." Ibid.

The panel also pointed to the provision in the same section governing "community credit unions" -- membership in which is limited to "groups within a well-defined neighborhood, community, or rural district." Id. at 529. Acknowledging that the provisions do not use the same terms, the panel nonetheless concluded that because the statute "does not allow multiple groups, each within a different neighborhood, to form a single community FCU,"

the statute cannot "allow multiple groups, each drawn from a different occupation * * * to form an occupational FCU." Ibid.

Lastly, the panel found that "Congress intended that each FCU be a cohesive association in which the members are known by the officers and by each other in order to 'ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default.'" Id. at 529-30 (citation omitted). The panel concluded that "the NCUA's reading, which permits multiple unrelated groups to form an occupational FCU, frustrates that purpose." Id. at 530. The panel therefore held that "all members of an FCU must share a common bond," and "[i]f there are multiple occupational groups within a single credit union, then it is not sufficient that the members of each different group have a bond common to that group only." Id. at 530. The panel accordingly remanded the case "for the entry of declaratory and injunctive relief, consistent with the foregoing opinion, concerning the NCUA's 1989 and 1990 approvals of certain applications filed by ATTF." 90 F.3d at 531.[2]

ARGUMENT

[2]Plaintiffs are currently asking the district court to enjoin the NCUA from allowing any federal credit union to add new multiple employee membership groups, or to add new members from groups that were previously approved under the NCUA's multiple employee group policy. Pl.'s Motion for Immediate Enforcement of the Mandate, (Aug. 23, 1996), at 3. "Recognizing that divestiture" of existing groups "will raise more complicated issues," plaintiffs have reserved that question "for subsequent resolution." Id. at 6-7.

1. By limiting federal credit union membership to "groups having a common bond of occupation or association," 12 U.S.C. 1759 (emphasis added), the FCUA allows for the possibility that membership in a federal credit union may consist of more than one employee group. At worst -- as the panel appeared at first to recognize -- the statute is ambiguous: "the plural noun 'groups' could refer * * * to multiple groups in a single FCU," or "to each of the groups that forms a credit union." 90 F.3d at 528.

The panel nonetheless overturned the agency's construction by concluding that, despite the apparent imprecision of the statutory language, Congress's intent to require that all members of a federal credit union share a common bond is "clearly discernible" from the statute's text and purpose. Ibid. As shown below, the panel's analysis is irretrievably flawed.

a. The panel fell into error by concluding that the term "common bond" as used in the FCUA would be rendered "surplusage" by the agency's construction. See 90 F.3d at 528. It reached this conclusion because it assumed that the common characteristics that define a "group" under the statute must necessarily be the same as the unifying relationship between individuals embraced in the statutory term "common bond." Ibid. Under the NCUA's interpretation, however, the requirement that members have a "common bond" is in addition to their being part of a "group." Thus, to join an occupational credit union, a group must show not just that it is defined by an occupational characteristic of

some sort, but that its members are connected with one another in a relationship sufficiently substantial to qualify as a "common bond." The agency's interpretation thus gives meaning both to the term "group" as well as to the term "common bond," and renders neither redundant.

The panel equated the FCUA's use of the term "group" and the term "common bond" by relying on a dictionary definition of a group as "an assemblage . . . having some resemblance or common characteristic." See 90 F.3d at 528. On the basis of this definition, the panel concluded that "a common bond is implicit in the term 'group.'" Ibid. But the common characteristic that defines a group can be tenuous or trivial. As the dictionary relied upon by the panel states -- in a definition for the word "group" that the panel did not quote -- a "group" can mean "an assemblage of persons or things" that are "regarded as a unit" simply "because of their comparative segregation from others." Webster's New Int'l Dictionary 955 (definition 3). Thus, a group can simply mean "a cluster," or an "aggregation." Ibid. By contrast, a "bond" connotes a more substantial connection between individuals -- a "uniting" or "cementing" force. Oxford English Dictionary 981 (1933); accord Webster's, at 251 (a "bond" is "a binding force or influence," or "a uniting tie").

Thus, it is perfectly appropriate to speak of a "group" of persons with brown hair, or with June birthdays. But such traits, although held by a number of persons, do not easily sa-

tisfy the more substantial unifying relationship suggested by the term "common bond." Similarly, one can imagine occupational groups composed of all those with jobs requiring them to be at work from 9:00 a.m. to 5:00 p.m., or all those employed within the Cincinnati city limits. One would not thereby be required to conclude that the members of those groups were held together by a common bond of occupation. In short, because a group can as easily be an unruly mob with highly disparate goals as an organization united by common concerns, a group is not necessarily united by a common bond.[3]

b. The panel's construction also neglects other important aspects of the statute's language. For example, if "a common bond is implicit in the term 'group," and all members "must share a common bond," 90 F.3d at 531, then all members of a federal credit union ultimately must be members of a single encompassing group. But the FCUA limits federal credit union membership to "groups having a common bond of occupation." 12 U.S.C. 1759 (emphasis added). The panel suggested that "the plural noun 'groups' could refer not to multiple groups in a single FCU but to each of the groups that forms a credit union." 90 F.3d at

[3]The NCUA's regulations expressly recognize the difference between the characteristics that may define a group, and those that satisfy the common bond provision. Thus, the agency does not permit a federal credit to represent "[p]ersons employed or working in Chicago, Illinois," or "[p]ersons working in the entertainment industry in California," because such occupational groups are insufficiently defined. See IRPS 94-1, 59 Fed. Reg. at 29076; IRPS 89-1, 54 Fed. Reg. at 31169.

528. Even if that were the case, the statute equally allows for the possibility that more than one group can join a single federal credit union, as the district court held here.

The panel also concluded that all members of a federal credit union must "share" a common bond. 90 F.3d at 531. But, notably, the word "share," which connotes a degree of mutuality, does not appear in the relevant statutory phrase. Instead, the statute provides that membership groups "hav[e]" a common bond, which does not have the same connotation.

c. That the statute limits community federal credit union membership to "groups within a well-defined neighborhood, community, or rural district," 12 U.S.C. 1759, does not support the panel's reading of the statute. See 90 F.3d at 529. The NCUA interprets this provision to restrict a community federal credit union's field of membership to a single geographic area because the statute requires that a community-based federal credit union serve groups "within" a well-defined locale, not because the word "groups" means something different in the common bond provision than in the community field of membership provision.

d. Finally, the agency's policy does not frustrate the statute's purpose. See 90 F.3d at 529. To be sure, the greater the number of different employees that are included in a federal credit union's field of membership, the less likely that the credit union's loan officers will be able to gauge personally the creditworthiness of individual borrowers solely on "character,"

or that borrowers would be deterred from defaulting because of personal opprobrium or shame. See id. at 529-30. But the FCUA places no limit on the size of a federal credit union, and Congress was aware when it passed the statute in 1934 that some state credit unions had grown sufficiently large that personal knowledge of every borrower's character was impossible. See Credit Unions: Hearing before a Subcomm. of the S. Comm. on Banking and Currency, 73d Cong., 1st Sess. 15 (1933) (statement of Roy F. Bergengren) (noting that Boston's Telephone Workers Credit Union had 16,000 members). Modern technology and the widespread availability of credit information have further lessened the necessity for lending officials to be personally acquainted with a borrower in order to evaluate his or her creditworthiness or the likelihood that a loan will not be repaid.

Moreover, the FCUA was intended to advance other significant goals as well. For one thing, the statute was supposed to promote a "form of credit organization capable of reaching the masses of the people." S. Rep. No. 555, 73d Cong., 2d Sess. 3 (1934). The NCUA's multiple employee group policy directly advances that goal, by permitting employees of small businesses to gain access to credit union services even though they might not have enough potential members to establish a viable stand-alone institution. The FCUA also was designed to "promote the growth of credit unions" and "enhance credit union stability." See Community First Bank v. NCUA, 41 F.3d 1050, 1054 (6th Cir. 1994).

The NCUA's policy furthers those goals by ensuring that a single credit union will not be unduly dependent upon the fortunes of a particular company or industry. The panel's decision thwarts these weighty statutory concerns.

In the end, even if the panel's reading is a possible construction of the FCUA, it is not the only interpretation of the statute. And it is the agency, not the courts, to which Congress has entrusted the administration of the FCUA. Chevron, 467 U.S. at 843 n.11 (1984).

2. The panel also perpetuated this Court's prior erroneous conclusion that the plaintiffs in this case had standing to challenge the NCUA's multiple employee group policy.

An entity does not have standing to bring suit unless it can show that the injury of which it complains "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990). The zone of interests inquiry thus requires the courts to examine "Congress's intent in enacting [the relevant statutes] in order to determine whether [plaintiffs] were meant to be within the zone of interests protected by those statutes." Air Courier Conference v. Postal Workers, 498 U.S. 517, 524 (1991).

In its prior panel decision, this Court found that "Congress did not, in 1934, intend to shield banks from competition from credit unions." 988 F.2d at 1275. Indeed, as the Court explain-

ed, "the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that the banks disdained." Ibid. The prior panel nonetheless held that banks were "suitable challengers" to enforce the FCUA's common bond requirement, because there is "a reason to think" that the banks' interest in "patrolling a statutory picket line will bear some relation to the congressional purpose" underlying the statute. 988 F.2d at 1276 (emphasis added). See also Community First Bank v. NCUA, 41 F.3d 1050, 1054 (6th Cir. 1994).

The Court's standing determination permits plaintiffs to bring claims under a statute not just when there is no affirmative "indication of congressional purpose to benefit" them, see Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400 (1987), but when there is every indication that Congress did not intend to do so. For this reason, and because this aspect of the Court's decision is in direct conflict with the Fourth Circuit's holding in Branch Bank & Trust Co. v. NCUA Bd., 786 F.2d 621, 625-27 (4th Cir. 1986), cert. denied, 479 U.S. 1063 (1987), the full Court should also grant rehearing to reconsider plaintiffs' standing in this case.

## CONCLUSION

For the foregoing reasons, this Court should vacate its decision that the NCUA's approvals violate the common bond provision, and should rehear the case or rehear it en banc.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

ERIC H. HOLDER, JR.
United States Attorney

OF COUNSEL:

ROBERT M. FENNER
General Counsel

JOHN K. IANNO
Attorney
National Credit Union
Administration
1775 Duke Street
Arlington, VA 22314

DOUGLAS N. LETTER
(202) 514-3602
JACOB M. LEWIS
(202) 514-5090
Attorneys, Appellate Staff
Civil Division, Room 3617
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

SEPTEMBER 1996

ATTACHMENT

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of September 1996, I served the foregoing Petition for Rehearing with Suggestion for Rehearing En Banc upon counsel of record by causing two copies each to be delivered first class mail, postage prepaid to:

Michael S. Helfer
Christopher R. Lipsett
Leon B. Greenfield
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

John J. Gill
Michael F. Crotty
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Edward C. Winslow III
William C. Scott
Brooks, Pierce, McLendon,
Humphrey & Leonard
2000 Renaissance Plaza
230 N. Elm Street
Greensboro, NC 27402-0820

Paul H. Stock
Kathy Klotzberger
N.C. Alliance of Community
Institutions
Post Office Box 19999
Raleigh, N.C. 27619-0999

Paul J. Lambert
Teresa Burke
Bingham, Dana & Gould
1550 M Street, N.W., Suite 1200
Washington, D.C. 20005

Brenda S. Furlow
Credit Union National Association, Inc.
5710 Mineral Point Road,
P.O. Box 431
Madison, Wisconsin 53701-0431

JACOB M. LEWIS, Attorney